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### IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

### SECOND APPELLATE DISTRICT

### DIVISION FIVE

JAMES HAWRYLA MECREDY,

Plaintiff and Appellant,

v.

SONIC INDUSTRIES, INC.,

Defendant and Appellant.

B286439

(Los Angeles County Super. Ct. No. BC593961)

APPEAL from a judgment and orders of the Superior Court of Los Angeles County, Gregory W. Alarcon, Judge. Reversed and remanded.

The Rubin Law Corporation, Steven M. Rubin; and James H. Cordes, for Plaintiff and Appellant.

Rosen Saba, Ryan D. Saba, Elizabeth L. Bradley, for Defendant and Appellant.

Defendant and appellant Sonic Industries, Inc. (Sonic) appeals from a judgment following a jury trial in favor of plaintiff and appellant James Hawryla Mecredy (Mecredy), and the trial court's orders denying Sonic's motions for nonsuit, new trial, and judgment notwithstanding the verdict. Mecredy was laid off after a long career selling aerospace parts for Sonic. He subsequently secured a position with American Drilling, Inc. (American Drilling), a "job shop" that derived a substantial portion of its revenue performing machine operations on aerospace parts for Sonic. American Drilling had not competed with Sonic for business prior to hiring Mecredy. Shortly after Mecredy was hired, Sonic's supply chain manager and its general manager contacted American Drilling regarding Mecredy's position with the company. Mecredy was fired within days of these conversations. Mecredy sued Sonic, and his claims for defamation per se, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage were tried by jury, resulting in special verdicts in his favor on all three claims.

On appeal, Sonic contends: (1) nonsuit should have been granted as to the defamation per se cause of action because the eight statements that Sonic employees allegedly made to American Drilling were not defamatory as a matter of law; (2) there is insufficient evidence to support the jury's verdict in favor of Mecredy on his defamation per se claim; (3) there is insufficient evidence to support the jury's verdicts in favor of Mecredy on his intentional and negligent interference claims, which are derivative of the defamation claim; (4) the damages award is duplicative; and (5) Sonic was denied a fair trial due to Mecredy's counsel's conduct in closing argument. Sonic urges us to enter judgment in its favor rather than remanding for retrial because its motion for judgment notwithstanding the verdict should have been granted.

Mecredy disputes Sonic's contentions, but in the event that we reverse the jury's verdicts, he argues that the trial court erred by refusing to instruct the jury that the separate wrongful act required to support his interference claims could be based on either Sonic's attempt to prevent competition (Bus. & Prof. Code, § 16600) or its employees' insinuations that he was unqualified to work in his position at American Drilling (defamation per quod). On crossappeal, Mecredy reiterates the arguments he makes in his response, and contends the trial court erred in granting Sonic's motion for nonsuit with respect to punitive damages and requests limited retrial on that issue.

We reverse the judgment in its entirety, and remand the cause for retrial on Mecredy's defamation per quod, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage claims.

#### **FACTS**

# $Operative\ Complaint^1$

In the operative second amended complaint, filed March 24, 2017, Mecredy alleged that he began working for Sonic in 1987, and was promoted to director of sales and marketing in 2003. He was responsible for managing a \$65 million product line of fasteners, personnel including inside sales staff and regional sales managers, sales, forecasting, and contract negotiation. He had a base salary of \$150,000, bonuses, stock options, and benefits. Sonic specialized in manufacturing bolts and fasteners for Boeing and other aerospace manufacturers. Mecredy grew the business from \$19 million to \$65 million while director of sales.

On or about December 5, 2014, Sonic gave Mecredy notice of termination as part of a larger reduction in force. He was provided with a severance agreement for his review, which stated that Mecredy acknowledged the restrictions and obligations in the agreement would not prevent him from gainful employment in his field of expertise or cause him undue hardship. He was recognized for his experience

<sup>&</sup>lt;sup>1</sup> Multiple defendants were named in the second amended complaint. On February 1, 2017, the parties stipulated to dismiss all defendants other than Sonic, and agreed that for purposes of trial the jury would be told all former defendants and Sonic should be considered as one in the same.

and told that he would not be prevented from seeking employment in the industry. The severance package did not contain a non-compete stipulation. It included a severance payout for 27 weeks. Mecredy was effectively terminated on December 26, 2014. He signed the severance agreement on or about January 12, 2015. A representative from human resources signed the severance agreement the same day.

On or about March 5, 2015, Mecredy obtained a position at American Drilling as vice president of sales. He was offered a base salary of \$150,000, with commissions dependent on the amount of sales revenue generated.

American Drilling supplied "machined products" for Sonic and similar companies. Mecredy was hired to expand American Drilling product sales directly to original equipment manufacturers. It was contemplated that he would also potentially work on increasing sales for Ortho-Precision Products, Inc. (Ortho-Precision), a separate entity owned by American Drilling, which manufactures orthopedic care products.

In March of 2015, Sonic employee Leslie Beske (Beske) came to American Drilling to ask then-vice president Richie Tatum (Tatum) if Mecredy was employed at American Drilling. When Tatum confirmed that Mecredy was working there, Beske said she would report the information to Sonic, but was unsure how the information would be perceived. The implication was that the information would not be well received.

Also in March of 2015, Sonic employee Brentt Ramsey (Ramsey) contacted Tatum and falsely represented that in accepting the job and working with American Drilling, Mecredy was potentially in violation of the separation agreement. Ramsey stated that Sonic was "uncomfortable" with Mecredy's employment with either American Drilling or Ortho-Precision, and made the veiled threat that Tatum would lose Sonic's business if Mecredy worked for either company. Sonic was aware that Ortho-Precision Products, Inc. was not in the same industry as Sonic and did not compete with Sonic.

The implication of Beske and Ramsey's statements was that Mecredy could not lawfully work at American Drilling or begin working with Ortho-Precision. The second amended complaint alleged that, through its agents, Sonic made "purposefully broad and vague statements with implications in regard to one or more of the following: (1) [Mecredy] had agreed to post-employment non-compete provisions; (2) such provisions were valid and enforceable; (3) [Mecredy's] employment with American Drilling, Inc. in any capacity, even becoming employed by its separate subsidiary Ortho-Precision Products, Inc., potentially violated non-compete provisions; (4) [Mecredy] possessed proprietary or 'trade secret' information that he would disseminate in violation of a separation agreement; (5) [Mecredy] should not be allowed to continue working at American Drilling, Inc. because of the terms and provisions [of] his separation agreement with [Sonic]; (6) [Mecredy] was untrustworthy and would not

protect the valid and legitimate interests of his prior employer; (7) [Mecredy's] employment at American Drilling or any of its subsidiaries, by and of itself, placed [Mecredy] in breach of a separation agreement [Mecredy] had with [Sonic]; (8) [Mecredy's] employment with American Drilling or any of its subsidiaries, including becoming employed in its separate subsidiary, Ortho-Precision Products, Inc., made [Sonic] 'uncomfortable' and could lead to substantially diminished business between American Drilling and [Sonic]."

Tatum fired Mecredy on March 25, 2015. After firing Mecredy, Tatum left a voice mail message with Sonic notifying it that Mecredy had been terminated. Mecredy was informed and believed that American Drilling cooperated with Sonic because it could not afford to risk the loss of its business.

On the basis of these facts, Mecredy alleged prevention of subsequent employment through misrepresentation in violation of Labor Code section 1050, defamation, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, and engaging in unfair business practices in violation of Business and Professions Code section 17200. Mecredy sought damages for loss of earnings, and mental and emotional distress; punitive damages; treble damages on his section 1050 cause of action; and attorneys' fees and costs.

Sonic generally denied the allegations in the second amended complaint and asserted numerous affirmative defenses.

## Jury Instructions

Prior to trial, on April 28, 2017, the parties filed an amended joint statement of not agreed upon jury instructions and objections. As relevant here, the parties disagreed on the appropriate instructions for defamation per se (CACI No. 1704), intentional interference with prospective economic advantage (CACI No. 2202), and negligent interference with prospective economic advantage (CACI No. 2204).

As to the defamation per se instruction, Sonic argued that Mecredy must rely on the statements alleged, whereas Mecredy argued that he was not required to rely on the statements set forth in the complaint because he was not in a position to know what statements were made prior to discovery. Sonic also argued that the statements included in Mecredy's version of CACI No. 1704 were not all slanderous per se.

With respect to the interference claims, Mecredy argued that "attempting to prevent [him] from competing with Sonic" should be included as an element of both causes of action in the instructions, because it had been established as an independent wrongful act that could form the basis for the claims through discovery. Sonic argued that "attempting

to prevent [him] from competing with Sonic" had not been pleaded as a basis for the interference claims, and Mecredy had not provided authority in support of his assertion that this conduct could constitute an independent wrongful act. Sonic asserted that Mecredy's interference causes of action were based solely on his cause of action for defamation; the complaint had never been amended to include attempting to prevent competition as a separate wrongful act.

Mecredy also requested that the trial court instruct on defamation per quod (CACI No. 1705) and unfair competition under Business and Professions Code section 16600 (Special Instruction No. 7). He argued that either cause of action could constitute unlawful conduct relating to his interference claims. Sonic opposed the instructions because Mecredy had not pleaded either theory, despite twice amending the complaint.

#### Trial

# James Mecredy

Mecredy testified that he began working at Sonic in 1987 as a data processor and worked his way up to director of sales and marketing. He held that position from 2003 until December of 2014, when he was laid off because his position was eliminated. Mecredy signed a severance agreement on January 12, 2015, and was paid a severance of \$83,000.

A few months later, Tatum contacted Mecredy and offered him a position with American Drilling, a long-time supplier of Sonic's that handled over-flow manufacturing services. Tatum wanted to transition American Drilling from being a "job shop" to an original equipment manufacturer, and hired Mecredy for that purpose.

Mecredy began working for American Drilling on March 5, 2015. Within a few weeks, Tatum told Mecredy that Beske had come to see him. Beske asked if Mecredy was working at American Drilling and what his role was. Tatum said that he told Beske American Drilling did not intend to compete with Sonic in aerospace parts. Her response had been that she was going to report back to Sonic but she did not know how the information would be received.

Tatum later informed Mecredy that he had spoken with Ramsey over the phone. As Mecredy understood it, his employment with American Drilling was discussed. Ramsey had been concerned about a potential violation of a separation agreement or a non-compete provision with Sonic. Tatum asked Mecredy if there was anything he should be concerned about and Mecredy said there was not. Tatum said he was very concerned because he relied heavily on Sonic's business and could not risk losing it. He told Mecredy he needed to terminate his employment.

### Leslie Beske

Beske testified that she was the supply chain manager for Sonic in March of 2015. Ramsey, who was plant manager of the facility, was Beske's supervisor. Ramsey informed Beske that he heard Mecredy was working for American Drilling. He asked her to verify the rumor and she agreed that she would. Beske and Ramsey discussed that they were concerned about Sonic's intellectual property. She went to American Drilling to ask about Mecredy's employment and his position. Beske met with Tatum in a conference room with the door closed. No one else could hear their conversation. Beske asked Tatum if Mecredy was working at American Drilling. Tatum confirmed that he was. She asked if Mecredy would be working with aerospace parts and what his role would be at American Drilling. Tatum said Mecredy was going to be working in the area of medical devices. Beske told Tatum she had concerns because of Mecredy's familiarity with Sonic's aerospace parts. While she did not state it to Tatum, Beske understood that Mecredy had vast knowledge of Sonic's fuse pins, the most highly guarded intellectual property of Sonic, and the process for making them. Beske told Tatum she didn't know how the information he had given her would be perceived. Tatum asked her to set up a conference call with Ramsey, which she agreed to do.

When Beske returned to Sonic, she informed Ramsey that Mecredy was working on medical parts. Ramsey was

not upset when she reported to him and did not express concern. He simply thanked her. She arranged the conference call between Tatum and Ramsey. Shortly after her visit, Tatum left a voicemail on Beske's phone informing her that he had terminated Mecredy. She relayed the news to Ramsey in an e-mail. Aside from the e-mail, Beske and Ramsey did not talk about Mecredy again.

Beske did not have any concerns regarding Mecredy's employment with American Drilling because Tatum told her he was working on medical parts. She denied ever saying anything disparaging or false about Mecredy. She never said anything that would leave the impression that she did not want Mecredy to work at American Drilling. Beske testified that she never made or implied the allegedly defamatory statements submitted to the jury, and did not know if Mecredy had a non-compete agreement or a separation agreement with Sonic.

# Brentt Ramsey

Shortly after Beske's meeting with Tatum, Ramsey called Tatum to discuss the transition following another company's purchase of Sonic. He made calls to all of his vendors regarding the transition to assure them that business would continue as usual. The call was brief and positive in tone. It was not Ramsey's intent to make Tatum feel uncomfortable. He wanted to reinforce the partnership between the companies. Ramsey did not say that he was

uncomfortable with Mecredy working for American Drilling or Ortho-Precision or say that if Tatum employed Mecredy it could lead to diminished business. He congratulated Tatum on choosing Mecredy. Ramsey asked Tatum if he would respect the nondisclosure agreement between Sonic and American Drilling, and Tatum assured him he would. After he understood that Mecredy would be working in the area of medical fasteners, Ramsey had no concerns about American Drilling violating its nondisclosure agreement with Sonic. Ramsey denied making or implying any of the alleged defamatory statements.

Ramsey testified that Mecredy had a nondisclosure agreement with Sonic. Mecredy had worked for Sonic for many years and had "a good understanding of what it takes to make the fasteners." Sonic's method of manufacturing fuse pins was highly specialized and took "years to develop." Ramsey considered Sonic's pricing structure for the fuse pins to be "important guarded information." When asked whether he would be concerned if he thought Mecredy would be working with aerospace fasteners, Ramsey answered "Yes" and elaborated, "The concern that -- would the important information of our product, fuse pin design and pricing, be part of [Tatum's] new business model."

#### Richie Tatum

In March of 2015, Tatum was vice president of American Drilling. American Drilling is a "job shop" that gets the majority of its business from fastener companies in the commercial aviation industry, including Sonic. The company makes bolts and performs machine operations like drilling and finishing.

Tatum learned Mecredy was looking for a sales position through an employee who had previously worked with Mecredy at Sonic and had a high opinion of him. Mecredy was "part of the team that grew [Sonic's] business," and Tatum felt he could help American Drilling grow as well. Tatum wanted to explore the possibility of stabilizing American Drilling's revenue stream by approaching customers directly. He testified, "I knew Jim was a salesperson. And we had never had a salesperson, and I thought he could help us out." When he hired Mecredy he made it clear that he wanted to try to grow the business, but that he was not willing to jeopardize his current business.<sup>2</sup>

Soon after Mecredy was hired, Space-Lok, one of American Drilling's bigger customers, called Tatum multiple times to inquire about Mecredy's employment. Tatum felt uncomfortable about the calls. He wasn't sure if he would lose Space-Lok's account, which comprised about 15 percent of his business.

Beske came to visit Tatum after Mecredy was hired. She asked if Mecredy was working at American Drilling and Tatum verified that he was. Beske responded, "Oh, okay. I

<sup>&</sup>lt;sup>2</sup> Tatum was the only person with authority to hire Mecredy at Ortho-Precision, but he never considered offering Mecredy a position there.

came over to ask if he's working here. I'm going to report to the people at Sonic that he's working here." "She said she didn't know . . . what was going to come of it, but she came over there to ask." Tatum did not recall speaking with Beske about anything else. As he remembered the conversation, she said, "I'm going to go back and let [Ramsey] know, and I don't know how it's going to be received." Tatum was confused by their conversation. He "didn't know where it was going to go." He was concerned about losing Sonic's business. The conversation made him uncomfortable.

Later, Tatum got a call from Ramsey, whom he had never spoken with before. Tatum felt it was important to make a good impression on Ramsey because he was "one of the decision-makers at one of my bigger company's customers." Tatum wanted to "create a favorable impression upon [Ramsey]" and "cooperate with him." He "considered Sonic a valuable customer and [Ramsey] was part of Sonic, so I wanted all my customers. I wanted to keep them all."

Tatum testified that "[Ramsey] kind of reiterated -- he said he heard [Mecredy] was working for us, and he was concerned about him, concerned about him working for us." When asked if he meant that Ramsey was uncomfortable, Tatum responded, "Yeah, that's the better word." Ramsey said he was uncomfortable with Mecredy working at either American Drilling or Ortho-Precision.

Tatum testified that "[Ramsey] mentioned something about the separation agreement. I don't remember the exact

wording. It was something to the effect of -- I'm not sure --I'm not sure how -- like 'there was a separation agreement out there, and I wasn't sure if any of this was affecting the separation agreement,' something like that." When asked whether Ramsey telling him that Mecredy might be in violation of a separation agreement "create[d] uncertainty in [his] mind," Tatum responded: "Probably a little bit, yes. I still felt-- I mean, . . . Jim told me he wasn't in violation. So in my mind, I felt Jim was telling me the truth. There was just more confusion. There was a lot of confusion." Counsel then asked, "Did he leave you with the impression that Jim Mecredy had a problem?" Tatum responded, "Potentially. It was along those lines." When asked if he believed that Ramsey was insinuating something, Tatum responded, "Yeah, he's basically throwing out something that I wasn't aware of before that now potentially -- yeah, he kind of threw something out there." Toward the end of the conversation Tatum asked Ramsey "Are you telling me to fire him'?" Ramsey responded, "Well, I can't tell you to fire him."

Tatum decided to terminate Mecredy about one day after the phone conversation with Ramsey. He testified that he "regretted the whole situation." Tatum did not want to fire Mecredy. He had been a good employee and Tatum believed he would have been successful if he had stayed at American Drilling. Tatum had no reason to terminate Mecredy for cause. He would not have fired Mecredy if he had not had the conversations with Beske and Ramsey.

## Sonic's Motions for Nonsuit

On April 28, 2017, Sonic moved for nonsuit on Mecredy's cause of action for violation of Labor Code section 1050. Thereafter, on May 23, 2017, after several additional days of testimony, Sonic moved for nonsuit on Mecredy's causes of action for defamation, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage, as well as Mecredy's requests for punitive damages and lost commission damages. The motions for nonsuit on the causes of action for defamation, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage made the same arguments Sonic raises on appeal. With respect to the Labor Code section 1050 cause of action, Sonic argued that Mecredy had not presented evidence that Sonic prevented him from being employed by a prospective employer as required. Tatum had never considered hiring Mecredy at Ortho-Precision. Sonic argued for nonsuit as to punitive damages on the basis that Mecredy failed to present evidence that Sonic acted with oppression, fraud, or malice.

# Trial Court's Rulings

On May 25, 2017, the trial court granted Sonic's motions for nonsuit on Mecredy's Labor Code section 1050 cause of action and his request for punitive damages. It

granted Sonic's version of the special verdicts for the intentional and negligent interference with prospective economic advantage claims, and granted Sonic's request to strike Mecredy's anti-competition language from the interference instructions and special verdicts, as not supported by the evidence. The court ordered the parties to make specific changes to the instructions and special verdict forms in conformance with its ruling.

## Jury's Special Verdicts

On May 30, 2017, the jury returned special verdicts in Mecredy's favor on his defamation, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage causes of action, and awarded him a total of \$474,004 in damages.

As relevant on appeal, the jury specifically found for Mecredy based on Statement No. 8, as follows:

"8. Did Leslie Beske or Brentt Ramsey state to Richie Tatum that James Hawryla Mecredy's employment with American Drilling or any of its subsidiaries, including its separate subsidiary, Ortho-Precision Products, Inc. made Sonic Industries, Inc. 'uncomfortable' and could lead to substantially diminished business between American Drilling and Sonic Industries, Inc.?"

The jury answered, "Yes."

"8.a. Did Richie Tatum reasonably understand that the statement(s) were about James Hawryla Mecredy?"

The jury answered, "Yes."

"8.b. Did Richie Tatum reasonably understand the statement(s) to mean that Mr. Mecredy was unqualified to perform his job at American Drilling?"

The jury answered, "Yes."

"8.c. Were the statement(s) substantially true?" The jury answered, "No."

"8.d. Did Leslie Beske or Brentt Ramsey fail to use reasonable care to determine the truth or falsity of the statement?"

The jury answered, "Yes."

"8.e. Was Leslie Beske's or Brentt Ramsey's conduct a substantial factor in causing James Hawryla Mecredy actual harm?"

The jury answered, "Yes."

The jury also answered "Yes" to the question posed for Statement No. 4, "Did Leslie Beske or Brentt Ramsey state to Richie Tatum that James Hawryla Mecredy possessed proprietary or trade secret information that he would disseminate in violation of a separation agreement?" and found that Tatum reasonably understood that the statement was about Mecredy. However, the jury found that Tatum did not "reasonably understand the statement(s) to mean that Mr. Mecredy was unqualified to perform his job at American Drilling." Accordingly, the jury stopped short of making any further findings that would potentially impose liability based on Statement No. 4, including no finding as to whether the statement was false, whether it was made by

Beske or Ramsey without the exercise of reasonable care, or whether it caused harm to Mecredy.

The jury made findings against Mecredy on all the other alleged defamatory statements. Specifically, the jury found Beske and Ramsey did not state to Tatum that (1) Mecredy had agreed to post-employment non-compete provisions; (2) Mecredy's post-employment non-compete provisions were valid and enforceable; (3) Mecredy's employment with Tatum's companies potentially violated non-compete provisions; (4) Mecredy should not be allowed to work at American Drilling because of his separation agreement with Sonic; (5) Mecredy was untrustworthy and would not protect Sonic's interests; or (6) Mecredy's employment at American Drilling placed Mecredy in breach of a separation agreement between Mecredy and Sonic.

# Sonic's Motions for Judgment Notwithstanding the Verdict and New Trial

On June 13, 2017, Sonic moved for judgment notwithstanding the verdict and new trial. In its motion for judgment notwithstanding the verdict, Sonic argued that Statement No. 8, which the jury found true, and which was the basis for the verdict in favor of Mecredy on his defamation cause of action, was not defamation per se because it did not state a fact about Mecredy, and was instead opinion. Sonic further argued that no evidence was presented that demonstrated Statement No. 8 was made or

that Tatum reasonably understood Mecredy was unqualified for his position with American Drilling. Sonic contended that the interference claims must also fail, because they depended entirely on the defamation cause of action.

Sonic moved for new trial on the bases that Mecredy's counsel intentionally misstated the law to the jury, that the evidence was insufficient to justify the verdict and contrary to law for the reasons argued in the motion for judgment notwithstanding the verdict, that the damages the jury awarded were excessive and duplicative, and that the interference claims should fail in light of the fact that the defamation claim was insufficient as a matter of law.

Mecredy opposed both motions.

The trial court denied the motions on August 10, 2017.

Sonic timely appealed the judgment and the trial court's orders.

Mecredy cross-appealed the trial court's order of nonsuit regarding punitive damages.

### DISCUSSION

# **Defamation**

On appeal, Sonic contends that the trial court erred in denying its motion for nonsuit on Mecredy's defamation per se cause of action because Statement No. 8 is not per se defamatory as a matter of law. Sonic also contends that there is insufficient evidence to support the jury's special

verdict findings with respect to Statement No. 8 even if the denial of nonsuit had been appropriate. Mecredy disagrees, but in the event that we reverse the defamation per se verdict he requests that we order the trial court to instruct the jury on a defamation per quod theory of liability. He argues that he properly pleaded defamation per quod in the second amended complaint and that the trial court erred in refusing to instruct the jury on that theory at trial.

We agree with Sonic that Statement No. 8 is not defamatory per se, and reverse the trial court's order denying nonsuit as to that cause of action. We agree with Mecredy, however, that he sufficiently pleaded a cause of action for defamation per quod, and that the trial court's refusal to instruct on that theory of liability was prejudicial error requiring remand.

# **Legal Principles**

# Standards of Review

"A defendant is entitled to nonsuit if the trial court determines as a matter of law that plaintiff's evidence, when viewed most favorably to the plaintiff under the substantial evidence test, is insufficient to permit a jury to find in his favor." (Mendoza v. City of West Covina (2012) 206 Cal.App.4th 702, 713 (Mendoza).) "In reviewing a grant of nonsuit, the appellate court evaluates the evidence in the light most favorable to the plaintiff. [Citation.] The

judgment of nonsuit will be affirmed if a judgment for the defendant is required as a matter of law, after resolving all presumptions, inferences and doubts in favor of the plaintiff. [Citation.] The review of a grant of nonsuit is de novo." (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 669.) "We review an order denying a motion for nonsuit by using the same test as the trial court, and will affirm that order so long as there was substantial evidence to support the jury's verdict." (*Mendoza, supra*, at p. 713.)

We review the sufficiency of the evidence supporting the jury's finding for substantial evidence, and will uphold the verdict whenever there is "substantial evidence, contradicted or uncontradicted, which will support [it] . . . .' [Citation.]" (Jameson v. Five Feet Restaurant, Inc. (2003) 107 Cal.App.4th 138, 143.)

# Defamation and Slander

"Defamation is an invasion of the interest in reputation. The tort involves the intentional publication of a statement of fact that is false, unprivileged, and has a natural tendency to injure or which causes special damage. (Civ. Code, §§ 45, 46; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts § 471, pp. 557–558.) Publication means communication to some third person who understands the defamatory meaning of the statement and its application to the person to whom reference is made." (*Smith v*.

Maldonado (1999) 72 Cal.App.4th 637, 645, fn. omitted (Smith).)

"Slander is a false and unprivileged publication, orally uttered, . . . which: [¶] 1. Charges any person with crime, or with having been indicted, convicted, or punished for crime; [¶] 2. Imputes in him the present existence of an infectious, contagious, or loathsome disease; [¶] 3. Tends directly to injure him in respect to his office, profession, trade or business, either by imputing to him general disqualification in those respects which the office or other occupation peculiarly requires, or by imputing something with reference to his office, profession, trade, or business that has a natural tendency to lessen its profits; [¶] 4. Imputes to him impotence or a want of chastity; or [¶] 5. Which, by natural consequence, causes actual damage." (Civ. Code, § 46.) "Subdivision[] . . . 3 (occupation) of Civil Code section 46 '[has] been held to include almost any language which, upon its face, has a natural tendency to injure a person's reputation, either generally, or with respect to his occupation [citations]; and words *clearly* conveying a meaning within one of the statutory categories are actionable per se.' [Citation.]" (Regalia v. The Nethercutt Collection (2009) 172 Cal.App.4th 361, 368.) "[S]lander per se . . . require[s] no proof of actual damages. [Citation.] A slander that does not fit into those four subdivisions is slander per guod, and special damages are required for there to be any recovery for that slander." (*Id.* at p. 367.)

"The question whether a statement is reasonably susceptible to a defamatory interpretation is a question of law for the trial court." (Smith, supra, 72 Cal.App.4th at p. 647.) "[S]tatements cannot form the basis of a defamation action if they cannot be reasonably interpreted as stating actual facts about an individual. . . . [Citation.]' [Citation.]" (Charney v. Standard General, L.P. (2017) 10 Cal.App.5th 149, 157, fn. omitted.) "Because the statement must contain a provable falsehood, courts distinguish between statements of fact and statements of opinion for purposes of defamation liability. . . .' [Citation.]" (Sanders v. Walsh (2013) 219 Cal.App.4th 855, 862 (Sanders).) "The critical question is not whether a statement is fact or opinion, [however,] but "whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact."" [Citation.]" (Ibid.) ""Only once the court has determined that a statement is reasonably susceptible to such a defamatory interpretation does it become a question for the trier of fact whether or not it was so understood. [Citations.]" [Citation.] The question is "whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact..." [Citation.]" (Id. at pp. 862–863.)

"Where the words or other matters which are the subject of a defamation action are of ambiguous meaning, or innocent on their face and defamatory only in the light of extrinsic circumstances, the plaintiff must plead and prove that as used, the words had a particular meaning, or

'innuendo,' which makes them defamatory. [Citations.] Where the language at issue is ambiguous, the plaintiff must also allege the extrinsic circumstances which show the third person reasonably understood it in its derogatory sense (the inducement)." (*Smith*, *supra*, 72 Cal.App.4th at pp. 645–646, fn. omitted.)

## **Discussion**

### Slander Per Se

Statement No. 8—that Sonic was "uncomfortable" with American Drilling's hiring decision and that it could result in decreased business between the companies—is not slander per se. On its face, the statement does not """declare[] or impl[y] a provably false assertion of fact""" about Mecredy. (Sanders, supra, 219 Cal.App.4th at p. 862.) The statement is about Sonic, and conveys Sonic's feeling or opinion regarding American Drilling's decision to hire Mecredy; it cannot be reasonably interpreted as stating an actual fact about Mecredy himself. (See Campanelli v. Regents of University of California (1996) 44 Cal.App.4th 572, 579 [father's statement that he felt pressure placed on son by basketball coach was making son physically ill was statement of feeling and not slander per sel.) There are many reasons Sonic may have been "uncomfortable"—it may have viewed Mecredy as exceptionally well-qualified for the position and therefore able to assist American Drilling in

competing with Sonic for business, or believed that the act of hiring Mecredy was a hostile expression of American Drilling's intent to compete regardless of Mecredy's qualifications or lack thereof. It is impossible to divine a specific fact about Mecredy from the statement without context. Because the statement does not clearly convey a meaning that is injurious to Mecredy in respect to his office, profession, trade or business, it is not slander per se. We therefore conclude that the trial court erred when it denied Sonic's motion for nonsuit on Mecredy's defamation per se claim with respect to the statement that Sonic was "uncomfortable," and reverse the verdict in Mecredy's favor in the defamation per se cause of action.

## Slander Per Quod

Mecredy argues that, even if it was not slander per se, Statement No. 8 was slander per quod, because under the circumstances the statement insinuated that Mecredy was unqualified for the position with American Drilling, which resulted in Mecredy being fired and suffering actual damages. He contends the trial court erred by refusing to instruct on his slander per quod theory, which he claims he

<sup>&</sup>lt;sup>3</sup> The parties agree that, if actionable as slander per se, the statement would fall under the third category in the slander statute.

properly pleaded in the second amended complaint.<sup>4</sup> Sonic contests the sufficiency of the seconded amended complaint with respect to a per quod theory of liability and argues that Mecredy failed to establish the trial court erred in rejecting the instruction. Sonic further contends that any purported error was harmless, regardless. We agree with Mecredy, and remand for a new trial with the jury to be instructed on a per quod theory of liability.

## **Legal Principles**

"It is hornbook law that each party to a lawsuit is entitled to have the jury instructed on all of his theories of the case that are supported by the pleadings and the evidence. It is incumbent upon the trial court to instruct on all vital issues involved." (*Phillips v. G. L. Truman Excavation Co.* (1961) 55 Cal.2d 801, 806, overruled on

<sup>&</sup>lt;sup>4</sup> On cross-appeal, Mecredy frames his argument as follows: "In light of these pleadings and evidence, the trial court erred in denying Mecredy his requested instructions. Because the jury found for Mecredy on different theories, he is not seeking to reverse that finding. However, Sonic is seeking reversal. Mecredy's argument is that, if this Court is inclined to reverse the jury's findings, that a new trial be granted, but [t]his time with the jury being instructed as to all proper and lawful theories." We interpret Mecredy's contention as one of instructional error that completely precluded a legal theory of liability, to be reached only in the event that the judgment is reversed.

another ground in Soule v. General Motors Corp. (1994) 8 Cal.4th 548; see also Moore v. Preventive Medicine Medical Group, Inc. (1986) 178 Cal. App. 3d 728, 744, quoting Western Decor & Furnishings Industries, Inc. v. Bank of America (1979) 91 Cal.App.3d 293, 309 ["[a] party is entitled to have the jury instructed on his theory of the case, if it is reasonable and finds support in the pleadings and evidence or any inference which may properly be drawn from the evidence"].) However, the refusal to instruct on an omitted legal theory is prejudicial error only if "it seems probable" that the error "prejudicially affected the verdict." [Citations.]' (Id. at p. 580.)" (Faigin v. Signature Group Holdings, Inc. (2012) 211 Cal.App.4th 726, 750.) "A 'reasonable probability' in this context 'does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility.' (College Hospital Inc. v. Superior Court (1994) 8 Cal.4th 704, 715.)" (Kinsman v. Unocal Corp. (2005) 37 Cal.4th 659, 682 (*Kinsman*).) The "determination" depends heavily on the particular nature of the error, including its natural and probable effect on a party's ability to place his full case before the jury." (Soule v. General) Motors Corp., supra, 8 Cal.4th at p. 580.)

Slander per se and slander per quod share three elements: (1) the defendant made a statement to a person other than the plaintiff; (2) the person reasonably understood that the statement was about the plaintiff; and (3) the defendant failed to use reasonable care to determine the truth or falsity of the statement. (Compare CACI No.

1704 (defamation per se) with CACI No. 1705 (defamation per quod).) To plead slander per quod as opposed to slander per se, the plaintiff must allege additional facts, which demonstrate that (1) because of the facts and circumstances known to the person to whom the statement was made, the statement tended to injure the plaintiff in his occupation, or to expose him to hatred, contempt, ridicule, or shame, or to discourage others from associating or dealing with him; (2) the plaintiff suffered harm to his property, business, profession, or occupation; and (3) the statement was a substantial factor in causing the plaintiff's harm. (Compare CACI No. 1704 with CACI No. 1705.) The plaintiff is not required to plead that the person who heard the statement reasonably believed the statement to have a specific defamatory meaning in an action for defamation per quod, as it is in an action for defamation per se.<sup>5</sup> (Compare CACI No. 1704 with CACI No. 1705.)

<sup>&</sup>lt;sup>5</sup> We reject Sonic's argument that Mecredy was required, but failed to allege or include in his instruction that Statement No. 8 insinuated he was unqualified for his job. Although Mecredy does not challenge the correctness of the special verdict finding that Tatum reasonably understood Statement No. 8 to mean that he was "unqualified," he need not show there is substantial evidence to support that specific meaning to establish that he was entitled to a per quod instruction. Defamation per quod does not require a finding that the person who heard the statement reasonably understood it to have a defamatory meaning. (See CACI No. 1705.) It instead requires the jury

### **Analysis**

## Pleadings

We agree with Mecredy that in light of the circumstances in which the statements were made, the second amended complaint sufficiently pleaded an action for defamation per quod. "Less particularity is required when it appears that defendant has superior knowledge of the facts, so long as the pleading gives notice of the issues sufficient to enable preparation of a defense." (*Okun v. Superior Court* (1981) 29 Cal.3d 442, 458 (*Okun*).) Here, the statements at issue were made in two private conversations to which Mecredy was not privy. He was therefore not able to allege the exact statements made.

Mecredy specifically pleaded that in March of 2015, Beske met with Tatum in person at American Drilling to determine whether Mecredy was working for American Drilling. When Tatum confirmed that Mecredy was working at American Drilling, Beske said she would report the information to Sonic, but was unsure how the information would be perceived, with the implication that the

to make a finding that the statement tended to injure the plaintiff in his occupation because of the facts and circumstances known to the person to whom the statement was made. Mecredy was not required to plead that Statement No. 8 meant that he was unqualified to state a claim for defamation per quod.

information would not be well received. Mecredy also pleaded that Ramsey contacted Tatum in March of 2015 and spoke with him about Sonic's discomfort with Mecredy's employment at American Drilling and the possibility that Mecredy's position at American Drilling placed him in violation of a separation agreement with Sonic. He also pleaded that he was fired and suffered actual damages as a result of these statements. We conclude that these facts and allegations were adequate to place Sonic on notice of the issues, such that Mecredy sufficiently pleaded defamation per quod. (See *Okun*, *supra*, 29 Cal.3d at p. 458 [slander can be charged by alleging, based on information and belief, the substance of the defamatory statement].)

Moreover, although the second amended complaint employed the words "per se," in substance it additionally stated a per quod cause of action. Mecredy alleged that Sonic made false representations to American Drilling about him "through purposefully broad and vague statements with implications in regard to one or more of" eight possible meanings—which through the trial court's rulings in Sonic's favor became the eight "statements" upon which the jury was instructed and made special verdict findings. In short, he pleaded that Sonic made statements that—although not necessarily defamatory on their face because as-of-yet unknown to Mecredy—tended to harm Mecredy in occupation due to the facts and circumstances known to Tatum.

### Substantial Evidence

There is substantial evidence that could support a finding in favor of Mecredy on a defamation per guod theory of liability, if such a theory were properly put to a jury. With respect to Statement No. 8, sufficient evidence supports the jury's finding that Ramsey stated to Tatum that Mecredy's employment with American Drilling made Sonic "uncomfortable." Tatum was asked whether Ramsey told him that he was uncomfortable with Mecredy working at American Drilling three times, and each time Tatum answered either "Yes" or "Correct." The jury's finding that Tatum reasonably understood the statement to be "about" Mecredy is also supported—it is apparent from the statement on its face that the discomfort arose from Mecredy's employment at American Drilling and is therefore "about" Mecredy. There is also substantial evidence in the record to demonstrate that Sonic did not use reasonable care to determine the truth or falsity of the statement. It is undisputed that neither Beske nor Ramsey approached Mecredy to determine whether his position with American

<sup>&</sup>lt;sup>6</sup> We use Statement No. 8 as an example in our discussion for convenience and because the parties' arguments focused on Statement No. 8 in particular. On remand, the trial court is not limited to instructing on Statement No. 8, however, if it concludes that the pleadings and the evidence support a per quod instruction on a different statement or statements.

Drilling might legally conflict with his obligations to Sonic, and that neither of them had actually seen a nondisclosure agreement between Mecredy and Sonic prior to speaking with Tatum. Substantial evidence was presented that Beske's or Ramsey's statements were a substantial factor in causing Mecredy actual harm. Tatum testified that he was "confused," "concerned," and "uncomfortable" after both conversations. He thought it was possible that Mecredy "had a problem." Mecredy testified that Tatum came to him after speaking with Ramsey and asked Mecredy if there was anything he should be concerned about. Tatum then fired Mecredy within days of the conversation with Ramsey and testified that he fired him because of the conversation with Ramsey. Evidence was presented that Mecredy suffered significant damages as a result of losing his job at American Drilling.

The question of whether Statement No. 8 tended to injure Mecredy in his occupation because of the facts and circumstances known to Tatum was never put to the jury, but there is substantial evidence in the record that would support a finding for either party. As we have discussed, Tatum testified that he believed it was possible Mecredy "had a problem" after speaking with Ramsey, and fired him almost immediately upon learning of this possibility, which could support a finding in favor of Mecredy. With respect to Sonic's arguments, Tatum testified that he believed Mecredy when he said he was not in violation of a separation agreement, and that he thought Mecredy was a good

employee who would have been successful if he had stayed at American Drilling. Evidence was presented that Tatum may have fired Mecredy simply due to Sonic's threat of decreased business, such that a reasonable juror could make a finding in Sonic's favor.

# **Prejudice**

As we discuss *post*, Mecredy's causes of action for both intentional and negligent interference with prospective economic advantage depend entirely upon the success of Mecredy's causes of action for defamation (per se or per quod). Because we have concluded that his cause of action for defamation on a per se theory cannot stand, the viability of both of his claims for interference with prospective economic advantage hangs on the viability of his defamation cause of action on a per quod theory of liability.

Given the evidence both in support of and against a finding favorable to Mecredy on a factual finding that could have supported the jury's special verdict in his favor on three causes of action, we conclude that the error was prejudicial and that the correct remedy is to remand for retrial on the defamation per quod theory of liability. (See *Kinsman*, *supra*, 37 Cal.4th at p. 682 [instructional error prejudicial where factual matter was not submitted to the jury and evidence is capable of inferences in both parties' favor].)

# Interference With Prospective Economic Advantage<sup>7</sup>

Sonic next argues that the verdicts in Mecredy's favor for his negligent and intentional interference with prospective economic advantage causes of action must be reversed because the jury's findings were based solely on his defamation per se claim at trial. We agree.

"The elements of a claim of interference with economic advantage and prospective economic advantage are: ""(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional [or negligent] acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." [Citations.]' [Citation.]' [Citation.] [¶] . . . 'The tort of intentional interference with prospective economic advantage is not intended to punish individuals or commercial entities for their choice of commercial relationships or their pursuit of commercial objectives,

<sup>&</sup>lt;sup>7</sup> "The difference between intentional interference and negligent interference with prospective economic advantage relates to the defendant's intent.' [Citation.]" (*Redfearn v. Trader Joe's Co.* (2018) 20 Cal.App.5th 989, 1006 (*Redfearn*).) In light of our disposition, *post*, it is unnecessary to determine Sonic's intent, and we treat the two causes of action identically for purposes of this discussion.

unless their interference amounts to independently actionable conduct. [Citation.]' [Citation.] As such, courts require an additional element, that the alleged interference must have been wrongful by some measure beyond the fact of the interference itself. [Citation.] For an act to be sufficiently independently wrongful, it must be 'unlawful, that is, . . . it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.' [Citation.]" (Crown Imports, LLC v. Superior Court (2014) 223 Cal.App.4th 1395, 1404 (Crown Imports).) A plaintiff must plead and prove the elements of an interference claim, including the wrongful act upon which the interference claim is based. (Redfearn, supra, 20 Cal.App.5th at p. 1006.) It is not necessary that the wrongful act be pleaded as an independent claim or that the wrongful act be against plaintiff. (Crown Imports, supra, 223 Cal.App.4th at p. 1405.)

Here, the only wrongful act pleaded as an element of the interference claims was that Beske and/or Ramsey made false representations to Tatum regarding the possible existence of a non-compete agreement or separation agreement that would make it unlawful for Mecredy to work at American Drilling—i.e., defamation. Because the verdict on Mecredy's defamation per se cause of action must be reversed, there is no basis for his interference causes of action based on the jury's special verdicts.

Mecredy tries to circumvent this result by arguing that the second amended complaint included a claim for violation of Business and Professions Code section 17200. This argument fails for several reasons. First, the Business and Professions Code section 17200 claim was not pleaded as a basis for the interference claims, but rather as a stand-alone claim. Mecredy was required to plead section 17200 as an element of the interference causes of action if that was his intent.

Second, even if Mecredy's section 17200 claim had been pleaded as the wrongful act that formed the basis for the interference claims, a plaintiff alleging a section 17200 claim must allege an act of unfair competition, and in this case the defamation claim served as the basis for the unfair competition cause of action under section 17200. Absent substantial evidence to support the defamation per se claim, there is insufficient evidence to support Mecredy's section 17200 claim. (See *Krantz v. BT Visual Images* (2001) 89 Cal.App.4th 164, 178 (*Krantz*) [When a § 17200 claim is derivative of other substantive causes of action, the claim "stand[s] or fall[s] depending on the fate of the antecedent substantive causes of action"].)

Mecredy creatively argues that "when Sonic applied pressure on American Drilling to fire Mecredy, Sonic was essentially forcing American Drilling to agree not to hire Mecredy to compete against Sonic, which in turn violates section 16600, and which also is 'unfair competition' which is forbidden by section 17200." In addition to the fact that Mecredy never pleaded that Business and Professions Code section 16600 was a basis for the section 17200 claim or the

interference claims, there is no evidence to support such a claim. Section 16600 provides: "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void." There was no evidence presented of a contract between Sonic and Mecredy or Sonic and American Drilling that "restrained [either] from engaging in a lawful profession, trade, or business of any kind." To the contrary, the parties agreed that the separation agreement did not prevent Mecredy from working for American Drilling, and that there was not a non-compete agreement between Sonic and Mecredy. There was no evidence presented regarding the substance of the nondisclosure agreement between Sonic and American Drilling. Absent sufficient evidence of a contract that prevented either American Drilling or Mecredy from engaging in lawful profession, trade, or business, there is insufficient evidence to support a claim for interference on that basis.<sup>8</sup> (See *Krantz*, *supra*, 89 Cal.App.4th at p. 178.)

<sup>&</sup>lt;sup>8</sup> On cross-appeal, Mecredy argues that the trial court erred in granting Sonic's motion for nonsuit with respect to punitive damages, because punitive damages may be awarded in connection with an intentional interference cause of action. Having determined that there was insufficient evidence to support the claim for intentional interference on a per se theory of defamation, we conclude that any error in granting the nonsuit was not prejudicial. (*Piedra v. Dugan* (2004) 123 Cal.App.4th 1483, 1500 [even if

The verdicts in favor of Mecredy for interference with prospective economic advantage must be reversed, as they are derivative of his defamation per se claim. On retrial, however, Mecredy may assert both causes of action as supported by his defamation per quod cause of action.

error to grant nonsuit, judgment affirmed in absence of prejudice].)

## **DISPOSITION**

The judgment is reversed in its entirety, and the cause is remanded for retrial on Mecredy's defamation per quod, intentional interference with prospective economic advantage, and negligent interference with prospective economic advantage claims. Each party is to bear its own costs on appeal.

MOOR, J.

We concur:

BAKER, Acting P. J.

KIM, J.